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CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM 1933

No. [redacted] 22

IRVING TRUST COMPANY, as Trustee in Bankruptcy of OUTFITTERS OPERATING REALTY CO., INC., a Delaware corporation,

Petitioner,

against

A. W. PERRY, INC., a Massachusetts corporation,

Respondent.

MOTION AND BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WALTER E. HOPE,
H. STRUVE HENSEL,
Amici Curiae.

IN THE

Supreme Court of the United States

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IRVING TRUST COMPANY, as Trustee in Bankruptcy of OUTFITTERS OPERATING REALTY CO., INC., a Delaware corporation, *Petitioner,* *against* A. W. PERRY, INC., a Massachusetts corporation, *Respondent.*	No. 969.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Now come Walter E. Hope and H. Struve Hensel of 15 Broad Street, New York City, and move this Honorable Court for leave to file the annexed brief as *amici curiae* in support of the petition for writ of certiorari herein, the consent of counsel for the petitioner and of counsel for the respondent having been first obtained.

The undersigned ask this leave as counsel for Roy A. Heymann, Chandler Hovey and Thomas H. McInnerney, as Trustees in Bankruptcy of Louis K. Liggett Company appointed pursuant to an order of the United States District Court for the Southern District of New York in bankruptcy proceedings entitled "In the Matter of Louis

K. Liggett Company, Bankrupt—In Bankruptcy No. 56900", in which proceedings a number of claims are at issue involving large sums of money, which claims will be determined or at least materially affected by the outcome in the present cause.

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INDEX TO BRIEF

PAGE

STATEMENT BY COUNSEL 1

STATEMENT OF OPINIONS BELOW, FACTS, JURISDICTION, SPECIFICATION OF ERRORS AND STATUTE INVOLVED 2

SUMMARY OF ARGUMENT 3

ARGUMENT:

I. The decision of the Circuit Court of Appeals for the Second Circuit in this case conflicts with the decision of this Court in *Manhattan Properties, Inc.* v. *Irving Trust Company* 4

II. The prohibition of the Bankruptcy Act against the provability of future rent claims cannot be avoided by stipulation of the parties to a lease 5

III. This case is of great public importance 7

IV. A review of this decision has been practically invited by the Circuit Court of Appeals for the Second Circuit 8

V. A writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be granted in this case 9

CASES CITED:

Manhattan Properties, Inc. v. *Irving Trust Company,* 54 Sup. Ct. Rep. 385 ..3, 4, 5, 6 7, 9

Kothe v. *Taylor Trust,* 280 U. S. 224, 226 7

Wright v. *Irving Trust Company, Trustee,* decided by the C. C. A. for the Second Circuit on April 2, 1934 ..... 8, 9

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IRVING TRUST COMPANY, as Trustee in Bankruptcy of OUTFITTERS OPERATING REALTY CO., INC., a Delaware corporation, *Petitioner,* *against* A. W. PERRY, INC., a Massachusetts corporation, *Respondent.*	No. 969.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement by Counsel

This brief is submitted on behalf of Roy A. Heymann, Chandler Hovey and Thomas H. McInnerney as Trustees in Bankruptcy of Louis K. Liggett Company, appointed by the United States District Court for the Southern District of New York in a proceeding entitled "In the Matter of Louis K. Liggett Company, Bankrupt —In Bankruptcy No. 56900". In that proceeding there are now pending four cases in the United States District

Court for the Southern District of New York and in the Circuit Court of Appeals for the Second Circuit in which are involved lease clauses almost identical with the lease clause here involved, and which claims aggregate $399,765.34. There are also involved before the United States District Court for the Southern District of New York disputed claims aggregating $334,319.12, the determination of which claims involve consideration and application of the principles announced by the United States Circuit Court of Appeals for the Second Circuit in the instant case. Dividends upon such claims, if allowed, will clearly exceed 50% thereof (*i.e.*, $367,042.23) and probably 80% thereof (*i.e.*, $587,265.57). All of such claims have been objected to by the aforenamed Trustees in Bankruptcy and are now in litigation.

Statement of Opinions Below, Facts, Jurisdiction, Specification of Errors and Statute Involved

The opinions below, facts, jurisdiction of this Court, the statute involved and the errors committed by the United States Circuit Court of Appeals for the Second Circuit have been fully referred to and set forth in the petition for writ of certiorari and brief in support thereof filed herein by the petitioner.

Summary of Argument

Point I

The decision of the Circuit Court of Appeals for the Second Circuit in this case is contrary to, and does not correctly interpret, the decision of this Court in the case of *Manhattan Properties, Inc.* v. *Irving Trust Company,* 54 Sup. Ct. Rep. 385.

Point II

Parties to a lease cannot stipulate what claims, if any, are provable in bankruptcy.

Point III

The case is of utmost importance in that the clause construed is now in general use and, if the instant case is not reversed, will become uniform in all leases drawn for corporate tenants.

Point IV

The Circuit Court of Appeals for the Second Circuit has practically invited review of its decision in this case and, it is believed, expressed great doubt as to the correctness thereof.

ARGUMENT

I

The Decision of the Circuit Court of Appeals for the Second Circuit in this Case Conflicts with the Decision of this Court in *Manhattan Properties, Inc.* v. *Irving Trust Company*.

The undersigned, as counsel for the Trustees in Bankruptcy of Louis K. Liggett Company, in view of the size of such estate (over $7,000,000) and the large sums involved in the final determination of this case, feel constrained to add their plea to that of the petitioner for the granting of a writ of certiorari. It is also the belief of the undersigned that the practical consequences of the decision below are even more serious and threatening to the proper administration of estates in bankruptcy than is indicated in the petition and the brief of petitioner. In other words, it is believed that the necessity and importance of reversing the decision below have been, if anything, understated rather than overstated by petitioner.

The undersigned believe that the decision below is, as a practical matter, more than an exception to the decision of this Court in the case of *Manhattan Properties, Inc.* v. *Irving Trust Company*, 54 Sup. Ct. Rep. 385 and that the principles upon which the decision below is based are contrary to, and an erroneous interpretation of, the aforesaid decision of this Court.

Although it was clear that this Court in the *Manhattan Properties* decision definitely stated that future

rent claims were not provable under the Bankruptcy Act and could not be made so provable by stipulation of the parties or otherwise, except by an actual legislative amendment, this decision endeavors to limit the *Manhattan Properties* decision solely to covenants of indemnity and leases devoid of bankruptcy clauses. The following definite pronouncements of this Court were wholly ignored:

> "The courts uniformly held (under Act of 1867) that claims for future rent or *for damages for breach of covenant to pay rent,* were not provable under the act, though differing as to the reason; some holding them not contingent claims within the statutory definition, and others thinking the express permission of proof for rent past due at the date of bankruptcy impliedly excluded claims for rent thereafter falling due. * * *
>
> In view of the extended consideration and discussion which preceded the passage of the Act (of 1898), the failure to include a provision for claims for loss of rent or *for damages consequent on the abrogation of leases,* is significant of an intent not to depart from the precedents disallowing them." (Italics and parenthetical references ours.)

II

The Prohibition of the Bankruptcy Act against the Provability of Future Rent Claims Cannot be Avoided by Stipulation of the Parties to a Lease.

A fundamental question of law is here involved and must be definitely decided, *i.e.,* can the parties to a lease

stipulate as to what claims, if any, are provable in bankruptcy or is the intent of Congress, as expressed in the statutes and construed by this Court in the *Manhattan Properties* decision, to remain supreme?

Unless this decision is now reversed, the next step is obvious. Stripped of its legalistic verbiage and framework, the lease provision here involved is merely an agreement between the parties, contrary to the provisions of the Bankruptcy Act, giving the landlord a provable claim. This conclusion is not merely the conclusion of the undersigned but is the precise interpretation of the decision below made by two of the claimants referred to above in the Louis K. Liggett Company bankruptcy proceedings in a brief filed with the United States District Court for the Southern District of New York, in which the following statement is made with respect to the instant case:

> "it shows that by a proper clause in the lease rental or damages, not otherwise provable in bankruptcy, may become provable."

Unless undue attention is to be paid to form, leases and contracts of the future need only provide:

> "In the event of bankruptcy of either party, this lease (or contract) shall *ipso facto* terminate and the other party shall have a provable claim in bankruptcy in the amount of $."

If the sum fixed is not a penalty or unduly excessive, the claim fixed by stipulation must under the theory of the decision below be approved and allowed. Under such determination, Section 63 of the Bankruptcy Act will be

practically nullified and claims can and will be made provable without legislative action.

If such principle be established, there seems no reason why the corollary should not also be true, *i.e.,* parties can stipulate as to what claims will be not provable in bankruptcy and, therefore, not dischargeable. Obviously, such result cannot be permitted and the decision below must be reviewed and reversed.

III

This Case is of Great Public Importance.

The clause construed below is now in general use and, if the instant case is not reversed, will become uniform in all leases drawn for corporate tenants. Landlords will be insistent upon such form, particularly in the case of long term leases at high rentals. Since the claims will be payable only in the event of bankruptcy, the tenant will know that he will never have to bear the burden of the promise, will have little concern as to the interests of other creditors and will be enabled to favor particular creditors (see *Kothe* v. *Taylor Trust,* 280 U. S. 224, 226).

Furthermore, the clarification of the law effected by this Court in the *Manhattan Properties* case will be voided and costly litigation induced and invited.

IV

A Review of this Decision has been Practically Invited by the Circuit Court of Appeals for the Second Circuit.

It is believed that the Circuit Court of Appeals for the Second Circuit has expressed doubt as to the correctness of this decision and practically invited review thereof. In the case of *Wright* v. *Irving Trust Company, Trustee,* decided by the Circuit Court of Appeals for the Second Circuit on April 2, 1934 (opinion by Learned Hand, *C.J.*) such Court said:

> "In *In Re Roth & Appel,* 181 Fed. Rep. 667, we expunged a claim for rent because Section 63 (a) of the Bankruptcy Act forbad all contingent claims. That construction was repudiated in *Maynard* v. *Elliott,* 283 U. S. 273, and was not revived in *Manhattan Properties* v. *Irving Trust Co., supra.* As we understand it, the invalidity of rent claims is not deduced from the statute, but is a historical exception; the earlier acts by judicial construction had refused to allow claims for future rents, even when contingent claims were provable; although such claims are now generally provable, not only did Congress fail to include rents in 1898, but it continued inert through many amendments, in spite of a number of decisions in accord with the earlier interpretation. It is not altogether plain how we ought to circumscribe such a doctrine; how far it should be limited to the occasions which have heretofore arisen; how far we should rationalize it in the interest of convenience in application. However, we have twice already

> held that provable claims may arise under leases, if the obligation be certain in both event and amount at petition filed. *A. W. Perry Inc.* v. *Irving Trust Co.*, 69 Fed. (2) ; *Winston Salem Temple* v. *Irving Trust Co.*, 69 Fed. (2) . *Part of the discussion in Manhattan Properties Inc.* v. *Irving Trust Co., supra,* (290 U. S.), *certainly gives color to that notion, and we shall take it as the proper test, until the Supreme Court decides otherwise."* (Italics ours.)

It will be noted that the interpretation of the *Manhattan Properties* decision, as expressed in the foregoing quotation from the *Wright* case, is quite different from the interpretation expressed in the instant decision but that, having made the decision in the instant case, the Circuit Court of Appeals for the Second Circuit is now awaiting the review and final determination of this case before correcting, modifying or changing the rules previously announced.

V

A Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit Should Be Granted in this Case.

Respectfully submitted,

WALTER E. HOPE,
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New York, New York.

The undersigned, counsel for the petitioner and counsel for the respondent, hereby acknowledge service of, and consent to the filing of, the foregoing brief by Walter E. Hope and H. Struve Hensel, as *amici curiae*.

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EDWARD K. HANLON

Counsel for Irving Trust Company, as Trustee in Bankruptcy of Outfitters Operating Realty Co., Inc., a Delaware corporation, Petitioner.

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